602 DOCUMENTS

F 1.69/a
87/5

AUG 27 1980

FARRELL LIBRARY
KANSAS STATE UNIVERSITY

APPEAL OF ELLEN DEMIT

4 ANCAB 217

Decided *May 6, 1980*

Appeal of Ellen Demit from the BLM Decision F-14852-A and F-14852-B.

Dismissed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Dismissal

Absent reasons justifying continuance of the appeal, an appeal will be dismissed when there remain therein no issues to be resolved by the Board.

2. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance

When an entry is being excluded from a Decision to Issue Conveyance for the specific purpose of further adjudication, rather than as recognition of such entry pursuant to 43 CFR 2650.3-1(a), the decision must so state.

87 I.D. No. 5

APPEARANCES: Daniel Callahan, Esq., Alaska Legal Services Corp., on behalf of appellant; Robert H. Hume, Jr., Esq., Keane, Harper, Pearlman & Copeland, on behalf of Dot Lake Native Corp.; M. Francis Neville, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management.

OPTION BY ALASKA NATIVE CLAIMS APPEAL BOARD

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and Final Order dismissing the appeal of Ellen Demit, from the above-designated decision of the State Director, Bureau of Land Management.

Appellant, Ellen Demit, appealed the above-captioned decision on the grounds that the Bureau of Land Management (BLM) proposed to convey to Dot Lake Village Corp. (Dot Lake) certain lands including lands which are the subject of the appellant's allotment application, F-031446, located in secs. 34 and 35, T. 22 N., R. 7 E., Copper River meridian.

BLM, in a motion filed Apr. 9, 1980, states that they have determined that the appellant's allotment application should be reinstated as a pending application, and that the disputed lands in secs. 34 and 35, T. 22 N., R. 7 E., Copper River meridian, should not be conveyed pending adjudication of the reinstated application. Therefore, BLM moves the Board to issue an order to amend the Decision to Issue Conveyance (DIC) to exclude the pending allotment application and to dismiss this appeal.

Dot Lake continues to assert its opposition to validity of appellant's claim for Native allotment, but does not oppose remanding the matter to BLM for further adjudication. (Reply to Statement of Jurisdiction, Interest Affected and Reasons, Apr. 18, 1980.)

323-081 O - 80

By Stipulation filed with the Board Apr. 25, 1980, appellant concurs in the motion of BLM.

[1] Absent reasons justifying continuance of the appeal, an appeal will be dismissed when there remain therein no issues to be resolved by the Board.

Therefore, based upon motion of BLM and the file record of this appeal, the Board hereby Orders BLM to amend the DIC to exclude Native allotment application (F-031446) of appellant, Ellen Demit, from secs. 34 and 35, T. 22 N., R. 7 E., Copper River meridian, and to proceed with adjudication of said allotment.

The Board further Orders that the amendment to the DIC clearly states that the appellant's allotment applications is being excluded for purposes of further adjudication.

[2] Regulations in 43 CFR 2650.3-1(a) require BLM to "exclude any lawful entries or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title." The Board finds that when an entry is being excluded from a DIC for the specific purpose of further adjudication rather than as recognition of such entry pursuant to 43 CFR 2650.3-1(a), the decision must so state.

This decision of the Board to dismiss this appeal on motion of BLM is for the sole purpose of enabling BLM to proceed with adjudication of appellant's application for Native allotment. Therefore, the Board Orders that any decision resulting from BLM's adjudication shall be served on all parties to this appeal.

Based upon the above findings and conclusions, the Board hereby dismisses the above-designated appeal.

JUDITH M. BRADY,
Chief Administrative Judge.

APPEAL OF BRISTOL BAY NATIVE CORP.

4 ANCAB 222

Decided: *May 6, 1980*

Appeal of the Bristol Bay Native Corp. from a Bureau of Land Management decision.

Dismissed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Dismissal

Absent reasons justifying continuance of the appeal, an appeal will be dismissed when no issues remain to be resolved by the Board.

2. Intervention

Intervention in proceedings before the Alaska Native Claims Appeal Board is in the discretion of the Board. 43 CFR 4.909(b).

3. Intervention

The Board will not allow intervention following resolution of the issues on appeal.

4. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance—Alaska

Native Claims Settlement Act: Administrative Procedure: Publication

A redetermination of navigability by the Bureau of Land Management which modifies a published decision is itself a decision requiring publication in accordance with 43 CFR 2650.7.

APPEARANCES: Thomas S. Gingras, Esq., on behalf of Bristol Bay Native Corp.; Robert C. Babson, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; James T. Brennan, Esq., Hedland, Fleischer and Friedman, on behalf of Alaska Peninsula Corp.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and Final Order dismissing the appeal of Bristol Bay Native Corp. from the above-designated decision of the Bureau of Land Management.

Pursuant to regulations in 43 CFR Part 2650, *as amended*, and 43 CFR Part 4, Subpart J, the State Director or his delegate is the officer of the Bureau of Land Management, United States Department of the Interior, who is authorized to make decisions on land selection applications involving Native corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

PROCEDURAL BACKGROUND

The above-referenced decision of the Bureau of Land Management (BLM) approved the conveyance to Kokhanok Native Corp. (Kokhanok) of the surface estate of certain specified lands and conveyance of the subsurface estate of the same land to Bristol Bay Native Corp. (BBNC).

On Jan. 11, 1980, BBNC appealed said decision "insofar as it (1) constitutes a determination that Gibraltar Lake and Kokhanok Lake are non-navigable and (2) purports to charge the land submerged beneath those lakes against BBNC's acreage entitlement under Sections 12(a) and 14(f) of the Alaska Native Claims Settlement Act."

On Mar. 10, 1980, the Alaska State Director, BLM, concurred in a BLM redetermination that Kokhanok Lake, Gibraltar Lake, and Gibraltar Creek are navigable. Accordingly, the BLM on Mar. 11, 1980, filed with the Board a request for final order, which request stated that no dispute remains among the parties to this appeal and that the Board's issuance of a final order directing interim conveyance (IC) would now be appropriate. The request suggested the exclusion from the IC of the submerged lands underlying Kokhanok Lake, Gibraltar Lake, and Gibraltar Creek on the grounds that such submerged lands

are not considered "public lands." The request also stated that, following such exclusion, the acreage of the submerged lands underlying the named water bodies would not be charged against the acreage entitlement under ANCSA of either BBNC or Igiugig Native Corp.

BBNC thereafter concurred in the BLM's motion except insofar as reference should have been made to Kokhanok Native Corp. or Alaska Peninsula Corp. (APC), with which Kokhanok has merged, rather than in Igiugig Native Corp. BBNC also suggested that APC, not represented by counsel at that time, be given at least an additional 14 days in which to respond to BLM's motion insofar as it pertains to Gibraltar Creek.

APC subsequently appeared and stated that it did not oppose the redetermination of Gibraltar Creek, nor its inclusion in the final order, if such had no effect on the reservation of easements contained in the Decision to Issue Conveyance (DIC). BLM responded that it does not, as a result of any of the navigability redeterminations filed with the Board as of Apr. 1, 1980, propose to seek any easements not already proposed in the DIC. BLM's response referred to Lower (or Little) Pike Lake, a portion of the Copper River, and an unnamed interconnecting slough, in addition to Kokhanok Lake, Gibraltar Lake, and Gibraltar Creek. The former waters were held to be navigable in a BLM redetermination dated Apr. 1, 1980. BLM, also on Apr. 1, 1980, modified its former request for final order so as to propose the exclusion from conveyance of the lands underlying the water bodies newly determined to be navigable.

On Mar. 21, 1980, the State of Alaska filed a motion:

> (1) to intervene in this appeal as a necessary party for the purpose of determining those issues which relate to the navigability of the water bodies within the conveyance area, and (2) to amend the order segregating submerged lands to specify segregation of the lands underlying the Kokhanok and Copper rivers.

BBNC, APC, and BLM all opposed the State's motion to intervene on the basis that the motion was substantively an untimely notice of appeal and improperly sought to enlarge the scope of the appeal.

DECISION

In this appeal, BBNC appealed BLM's navigability determinations only with regard to Kokhanok Lake and Gibraltar Lake. BLM then made a redetermination that Kokhanok Lake and Gibraltar Lake are navigable, and declared that the acreage of the submerged lands underlying Kokhanok Lake and Gibraltar Lake will not be charged against the acreage entitlement of either BBNC or Igiugig Native Corp. (the Board construes BLM's statement as intending to refer to Kokhanok Native Corp. rather than Igiugig). These actions by BLM, when put into effect, will obviate the basis of this appeal and eliminate all the issues therein. There are, accordingly, no issues

yet to be resolved in this appeal, and no reasons justifying the continuance of this appeal are apparent from the record.

[1] Absent reasons justifying continuance of the appeal, an appeal will be dismissed when no issues remain to be resolved by the Board.

The State of Alaska on Mar. 21. 1980, moved to intervene in this appeal to contest the BLM determination that the Copper River and Kokhanok River are nonnavigable. Such motion was filed after the BLM filed notice of its redetermination of the navigability of Kokhanok Lake and Gibraltar Lake.

Intervention in proceedings before the Board is provided for by 43 CFR 4.909(b), which states, "Any person may petition the Board to intervene in an appeal. Upon a proper showing of interest under § 4.902, such person may be recognized as an intervenor in the appeal." Other than requiring service upon all parties of any motion to intervene and the filing with the Board of a certificate of service, 43 CFR 4.909(d), the regulations are void of any further requirements or guidelines regarding intervention.

[2] The provision of 43 CFR 4.909(b) stating that a petitioner "may be recognized as an intervenor" bestows on the Board discretion as to whether to allow intervention.

[3] In the discretion vested in the Board with regard to intervention, and in the absence of regulations regarding timeliness, the Board hereby rules that it will not allow intervention following resolution of the issues on appeal.

Accordingly, the motion of the State of Alaska to intervene is hereby denied.

Arguments have been made as to the permissible scope of intervention. Although the preceding ruling makes it unnecessary to answer these arguments, the Board declares that it would be inclined to rule that it will not allow the use of intervention to inject new and independent issues into an appeal. *See*, *Brune* v. *McDonald*, 75 P.2d 10, 13 (Or. 1938).

The BLM has filed with the Board notice of its redetermination that several water bodies unaffected by this appeal are navigable, and has requested the Board to order these water bodies excluded from the IC.

[4] The Board on Jan. 23, 1980, segregated the lands affected by this appeal from all other lands covered by the DIC appealed. The lands segregated were the submerged lands underlying Kokhanok Lake and Gibraltar Lake. The remainder of the lands covered by the DIC were therefore returned to the jurisdiction of the BLM. If these lands have not been conveyed, the BLM may proceed on its own with exclusion and redetermination. However, any redetermination of navigability which modifies a published decision is in itself a decision requiring pub-

lication in accordance with the provisions of 43 CFR 2650.7.

As to Kokhanok Lake and Gibraltar Lake, the subjects of this appeal, the BLM is hereby Ordered to publish an amendment to the DIC reflecting BLM's redetermination of the water bodies as navigable. Said amendment shall include notice that an appeal may be taken therefrom.

Publication need not delay conveyance of the lands unaffected by redetermination. Water bodies subject to redetermination and publication shall be excluded from conveyance, and the remaining lands conveyed immediately. Exclusion shall be by named water body rather than by sections. The acreage of the excluded submerged lands found to be navigable shall not be charged against the acreage entitlement under ANCSA of BBNC, Kokhanok, or APC.

As to Kokhanok's request that a redetermination of Gibraltar Creek as navigable not result in new easements, it should be noted that public easements are established pursuant to statutory and regulatory requirements, and are not a matter which can be disposed of through stipulation by parties to an appeal. The BLM is authorized and obligated, upon redetermination, to establish any additional easements required by law.

Further, the Board hereby dismisses the above-designated appeal.

JUDITH M. BRADY
Chief Administrative Judge

CLAYPOOL CONSTRUCTION CO., INC.

2 IBSMA 81

Decided *May 16, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from the amended decision of Administrative Law Judge Tom M. Allen (Docket Nos. CH 9-9-R and CH 9-22-R), issued on Oct. 30, 1979, which upheld Notices of Violation Nos. 78-I-3-15, 78-I-3-18, and 78-I-3-19, and vacated Cessation Orders Nos. 78-I-3-1 and 78-I-3-3.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally—Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Significance

A cessation order is not properly issued under sec. 521(a)(2) of the Act unless the environmental harm alleged to be significant may be described objectively on the basis of observations or measurements.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally—Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Imminence

A cessation order is not properly issued under sec. 521(a)(2) of the Act when the evidence does not support a finding that significant environmental harm may reasonably be expected to occur before the expiration of an abatement period that would be set pursuant to sec. 521(a)(3) of the Act.

APPEARANCES: Billy Jack Gregg, Esq., Office of the Field Solicitor,

Charleston, West Virginia, Mark Squillace, Esq., and James B. Weber, Esq., Office of the Solicitor, Washington, D.C., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., all for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) appealed from the amended decision of Administrative Law Judge Tom M. Allen, issued on Oct. 30, 1979, which upheld Notices of Violation Nos. 78–I–3–15, 78–I–3–18, and 78–I–3–19, and vacated Cessation Orders Nos. 78–I–3–1 and 78–I–3–3. Only the validity of the cessation orders was placed in issue in this appeal. We agree with the result reached by the Administrative Law Judge and affirm his decision.

Factual and Procedural Background

The cessation orders which are the subject to this appeal were issued by OSM to Claypool Construction Co., Inc. (Claypool), pursuant to sec. 521(a)(2) of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. § 1271(a)(2) (Supp. I 1977), on the basis of OSM's finding that Claypool had failed to secure from the State of West Virginia a permit required for surface coal mining operations conducted by the company. In his initial review of these enforcement actions, the Administrative Law Judge upheld the cessation orders.[1] This ruling was appealed by Claypool.[2]

On Sept. 26, 1979, the Board remanded the case to the Administrative Law Judge for a determination whether Claypool's failure to secure a State permit for its activities caused or could be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources.[3] In response to this remanded order, the Administrative Law Judge held that there was insufficient evidence of actual or impending environmental harm to warrant OSM's issuance of cessation orders to Claypool and, therefore, he vacated the orders.[4]

---

[1] Decision of Apr. 18, 1979, Docket Nos. CH 9–9–R and CH 9–22–R, at 2–5.

[2] OSM also filed an appeal with the Board, concerning the ruling of the Administrative Law Judge that he did not have jurisdiction to review the three notices of violation issued to Claypool. In response to this appeal the Board held that the Administrative Law Judge did have such jurisdiction. *Claypool Construction Co., Inc.*, 1 IBSMA 259, 270–271, 86 I.D. 486–492 (1979).

[3] *Claypool Construction Co., Inc.*, 1 IBSMA 259, 272, 86 I.D. 486, 492 (1979). The Administrative Law Judge also was instructed to rule on the validity of Notices of Violation Nos. 78–I–3–15, 78–I–3–18, and 78–I–3–19. These the Administrative Law Judge upheld, except for Violations No. 3 (failure to maintain a copy of the mine permit at or near the minesite) and No. 4 (failure to post a mine identification sign at the entrance to the minesite) of Notice of Violation No. 78–I–3–15. Amended Decision of Oct. 30, 1979, Docket Nos. CH 9–9–R and CH 9–22–R, at 3. The Administrative Law Judge vacated these charges in the notice on the grounds that they were included in the cessation orders. *Id.* Neither party appealed this ruling.

[4] Amended Decision of Oct. 30, 1979, *supra* at 2, n. 3.

OSM filed a notice of appeal from the Administrative Law Judge's amended decision on Nov. 30, 1979. OSM filed a brief; Claypool did not respond.

Issue

The issue in this appeal is whether Claypool's failure to have a State permit in and of itself constituted a condition, practice, or violation which caused or could reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Discussion

A cessation order is properly issued when an OSM inspector observes a condition, practice, or violation of the Act or regulations which is determined to be causing or can reasonably be expected to cause significant, imminent environmental harm.[5] When review is sought of a cessation order issued under such circumstances, OSM must be prepared to supply prima facie proof: (1) of the violation, practice, or condition identified in the order; (2) of significant, imminent environmental harm or a reasonable expectation thereof; and (3) of a casual link between such reasonably expected or existing harm and the proven violation, practice, or condition.[6]

By its evidence in the case OSM established that Claypool conducted surface coal mining operations without a requisite State permit, in violation sec. 502(a) of the Act, 30 U.S.C. § 1252(a) (Supp. I 1977), and 30 CFR 710.11(a)(2)(i).[7] Thus, the first requirement of proof, identified above, was met by OSM. Lacking, however, is proof of the existence or reasonable expectation of significant, imminent environmental harm related to this violation.[8]

[1] Significant, imminent environmental harm to land, air, or water resources is described in 30 CFR 700.5 (1978):[9]

(1) An environmental harm is any adverse impact on land, air, or water resources, including but not limited to plant and animal life.

[5] 30 U.S.C. § 1271(a)(2) (Supp. I 1977); 30 CFR 722.11(b). Other bases for OSM's issuance of a cessation order are: (1) a finding by an OSM inspector of a condition, practice, or violation of an applicable performance standard which creates "an imminent danger to the health or safety of the public" (30 CFR 722.11(a)); and (2) the failure of a person to abate a violation in accordance with the terms of a notice of violation (30 CFR 722.13).

[6] *See* 43 CFR 4.1171(a); *White Winter Coals, Inc.*, 1 IBSMA 305, 311–312, 86 I.D. 675, 678 (1979).

[7] *See* Tr. 8 (stipulation by counsel for Claypool that the company did not have a State mining permit for its operations); W. Va. Code §§ 20–6–8 and 20–6–18(a).

[8] Because the Board was not presented with sufficient evidence of reasonably expected or existing harm to uphold the cessation orders to Claypool, we need not and do not in this decision address OSM's arguments concerning a causal relationship between the failure to secure a mine permit and environmental harm.

[9] No description of the phrase "significant, imminent harm to land, air, or water resources" appears in the 1979 publication of 30 CFR 700.5. The phrase is described, however, in essentially the same language quoted in this decision in 30 CFR 701.5 (1979) (Permanent Regulatory Program: Definitions), and the Board perceives no reason at this time to assign a meaning to the phrase different from that described originally in the initial regulatory provisions and that now appearing in the permanent regulatory provisions. The Board reaches this conclusion without regard to whether the lack of a description of the phrase in 30 CFR 700.5 is the result of editorial oversight or intentional deletion.

(ii) An environmental harm is imminent if a condition, practice or violation exists which (a) is causing such harm or (b) may reasonably be expected to cause such harm at any time before the end of the reasonable abatement time that would be set under section 521(a)(3) of the Act.

(iii) An environmental harm is significant if that harm is appreciable and not immediately reparable.

In this description, "significant" harm is indicated to mean "appreciable" harm, which leads the Board to conclude that "significant" harm is that which at least may be observed and/or measured.[10] The only record evidence of observed or measured harm is that concerning the quality of water discharged from the area of Claypool's mining activity and the condition of spoil piles found there. In response to these circumstances OSM issued notices of violation to Claypool,[11] thus indicating OSM's judgment that this existing environmental harm did not warrant the issuance of cessation orders. The Board perceives no reason to reject this judgment.

[2] The remaining relevant evidence concerns environmental conditions attributable to mining activity preceding that of Claypool.[12] The Board acknowledges that the environmental harm resulting from this earlier activity could be compounded by Claypool's mining operations and thus become significant. However, even assuming that significant environmental harm could be expected in the future under these circumstances, such harm was not shown by OSM to be imminent. In 30 CFR 700.5, quoted above, "imminent" harm is described as that which may reasonably be expected to occur before the end of a reasonable abatement time that would be set under sec. 521(a)(3) of the Act, 30 U.S.C. § 1271(a)(3) (Supp. I 1977). This period may not exceed 90 days. The record indicates that Claypool had conducted mining operations in the area under consideration for a period of approximately 8 months previous to OSM's issuance of orders to cease these operations.[13] Yet, as was indicated above, OSM's inspectors did not find significant environmental harm at the times of their inspections of Claypool's operations. Indeed, it appears from the evidence that the environmental conditions existing prior to Claypool's operations were improved in some respects by the company's partial reclamation of areas of preexisting mine workings.[14] Under these circumstances the Board does not hold any antic-

[10] This is in accord with the range of meaning assigned to "appreciable" by lexicographers (*see, e.g., Webster's Third New International Dictionary* (G. & C. Merriam Co. 1971) at 105), and adopted by many courts. *See, e.g., Noland* v. *Wootan*, 102 Ariz. 192, 427 P.2d 143 (1967).

[11] *See Claypool Construction Co., Inc.*, 1 IBSMA 259, 263–264, 86 I.D. 486, 488–489 (1979) (description of the notices of violation issued to Claypool).

[12] *See id.* at 262, 86 I.D. at 487–488 (1979) (summary of evidence concerning conditions preexisting Claypool's mining activity).

[13] Tr. 180, 229.

[14] *See, e.g.*, Tr. 256–269. This is not to suggest that Claypool's activities were in compliance with applicable performance standards; rather, this observation relates merely to the reasonableness of OSM's expectation of imminent harm from Claypool's activities.

ipated significant environmental harm to have been proven imminent.

Because we have not been presented with evidence of the existence or reasonable expectation of environmental harm adequate to support the cessation orders, the decision of the Administrative Law Judge is affirmed.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

EASTOVER MINING CO.

2 IBSMA 70

Decided *May 16, 1980*

Appeal by Eastover Mining Co., from an Oct. 5, 1979, decision by Administrative Law Judge David Torbett in Docket No. NX 9-78-R sustaining Notice of Violation No. 79-II-53-2 and Cessation Order No. 79-II-53-3 issued to Eastover for failure to permit an inspector from the Office of Surface Mining Reclamation and Enforcement to take photographs during an inspection.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Inspections: Generally

An inspector may document conditions or practices discovered during an inspection that are believed to violate the Act or regulations by taking photographs.

2. Surface Mining Control and Reclamation Act of 1977: Inspections: Interference

A permittee's refusal to allow OSM to take photographs is an interference with the inspection that is sanctionable under the Act.

3. Surface Mining Control and Reclamation Act of 1977: Inspections: Interference—Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Since no provision in the regulations makes interference with an inspection administratively sanctionable, a notice of violation is not proper.

4. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally—Surface Mining Control and Reclamation Act of 1977: Hearings: Generally—Surface Mining Control and Reclamation Act of 1977: Inspections: Interference

Since the reviewing authority may use interference with an inspection against the permittee in any way deemed appropriate, a permittee who interferes with an inspection does so at the risk of severely prejudicing its own case.

APPEARANCES: Karl S. Forester, Esq., Forester & Forester, Harlan, Kentucky, for Eastover Mining Co.; Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Frank J. Ruswick, Jr., Esq., Walton D. Morris, Esq., Office of the Solicitor, Washington, D.C., all for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

On June 20, 1979, inspectors from the Office of Surface Mining Reclamation and Enforcement (OSM), were conducting a follow-up inspection at Eastover Mining Co.'s (Eastover's) mine in Arjay, Kentucky,[1] pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act).[2] When an inspector attempted to take photographs at the site of an alleged violation, she was informed that company policy prohibited the taking of photographs on company property by anyone except company employees. She was further informed that Eastover would take any photographs she requested and make copies available to her at no charge. She issued Notice of Violation No. 79–II–53–2 to Eastover, alleging a violation of sec. 502(e) of the Act, 30 U.S.C. § 1252(e) (Supp. I 1977), by "refusal to allow federal inspection by refusing to allow inspector to take photographs."[3] Twenty-four hours were given as an abatement period.

On her return the next day, the inspector was again prohibited from taking photographs. Consequently she issued Cessation Order No. 79–II–53–3 to Eastover for failure to abate the violation. On June 25, 1979, the inspector returned to the mine and was permitted to take the photographs. She terminated the cessation order at that time.

On Sept. 15, 1979, a hearing was held before Administrative Law Judge David Torbett on Eastover's application for review of the notice and the order. The opinion from the bench, which was confirmed in writing on Oct. 5, 1979, held that the notice and order were properly issued. Eastover appealed this decision on Oct. 12, 1979. Following the submission of initial briefs by both parties, on Mar. 11, 1980, the Board requested further briefing. All briefs have now been received.

Discussions and Conclusions

Sec. 502(e) of the Act requires the Secretary to establish a Federal enforcement program, including the regular inspection of surface coal minesites. Pursuant to that Congressional directive, 30 CFR Part 721 was promulgated providing for authorized representatives of the Secretary to have a right of entry, without advance notice, to, upon or through any surface coal mining operation to conduct inspections to ascertain compliance with sec. 502 (b) and (c) of the Act, 30 U.S.C. § 1252 (b) and (c) (Supp. I 1977).

[1] Neither the Act nor the regulations specifically state that OSM, without restraint by the permittee, can take photographs during an inspection. However, just as an inspec-

[1] On Mar. 29 and June 15, 1979, OSM had issued a notice of violation and a cessation order to Eastover. These citations are not at issue in this appeal.

[2] 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[3] Notice of Violation No. 79–II–53–2.

tor may use paper and pencil to record observations made during the course of an inspection, an inspector may document conditions or practices that are believed to violate the Act or regulations by taking photographs. The camera is merely a tool used by the inspector to document visual observations. It is possible that pictures taken by an inspector might be used by that inspector in describing to superiors the conditions observed at a particular minesite. This consultation, aided by the photographs, might lead a supervisor to conclude that enforcement action should be taken, or even that enforcement action should not have been taken. Therefore, photographs could be used to allow supervisory inspectors to share in inspection decisions.

Photographs taken by mine operators or their employees are not adequate substitutes for those taken by OSM inspectors during a mine inspection. This conclusion must follow from the possible uses which may be made of photographs by OSM, including their introduction into proceedings to review enforcement actions. Photographs so used must be authenticated, and it is incompatible with the adversarial nature of a review proceeding to require OSM to rely upon an opposing party to authenticate its evidence. The company may, of course, take its own photographs to counter those taken by an inspector; however, the ultimate use in any enforcement proceeding of any photographs taken at a minesite will be determined by their admissibility at a hearing.

[2] Furthermore, a permittee's refusal to allow OSM to take photographs is an interference with the inspection that is sanctionable under the Act. Sec. 521(c), 30 U.S.C. § 1221(c) (Supp. I 1977), allows OSM to seek injunctive relief against a permittee who interferes with a Federal inspection. Sec. 704, 30 U.S.C. § 1294 (Supp. I 1977), provides criminal penalties for willful interference with an inspector.

[3] The question before the Board, however, is whether such interference with an inspection may be reached through the issuance of a 30 CFR 722 notice of violation. 30 CFR 722 implements sec. 521(a) of the Act, 30 U.S.C. § 1271(a) (Supp. I 1977). Sec. 521(a)(3) provides that a notice of violation shall be issued when an inspector finds that a permittee is violating "any requirement of this Act." OSM argues that since a permittee may not interfere with the inspections mandated by sec. 502(e), such interference is a violation of a "requirement of this Act" and subject to a notice of violation. We cannot agree.

Sec. 521(a)(3) certainly does authorize the Secretary to issue notices of violation when it is determined "that any permittee is in violation of any requirement of [the Act]." But it is not only the Act that we are construing here. The enforcement being attempted by OSM is pursuant to sec. 501 (30 U.S.C. § 1251 (Supp. I 1977)) which mandates the enactment of regulations to im-

plement the Act. 30 CFR 722.11, which is concerned with imminent dangers, refers to "conditions or practices, or violations of applicable performance standards." 30 CFR 722.12, which deals with nonimminent dangers, pursuant to which the notice of violation in question would have to have been issued, provides that a notice of violation shall issue when OSM "finds a violation which is not covered by § 722.11." Secs. 722.11 and 722.12, thus, must be read together. In so doing the only kind of violations that are mentioned are "violations of applicable performance standards." We fail to find that interference with an inspector, illegal though it may be, is a violation of a performance standard. This conclusion is buttressed by secs. 521(c) and 704 of the Act, which expressly address and provide judicial sanctions for negative behavior, *i.e.*, interference with inspections. Since we do not find any provision in the regulations making interference with an inspection administratively sanctionable, we hold that the notice of violation and resulting cessation order in this case were improperly issued.

[4] However, even though interference with the inspector is not presently an action for which a notice of violation or cessation order may be issued, this fact in no way precludes OSM from presenting testimony on what a photograph would have shown or on other forms of interference at a hearing on any other notice or order resulting from violations discovered during the inspection. The reviewing authority may use the fact of interference against the permittee in any way deemed appropriate, including but not limited to determining the fact of violation and the amount of a civil penalty. The permittee who interferes in any way with an OSM inspector does so at the risk of severely prejudicing its own case.

For the foregoing reasons, the Hearings Division decision of Oct. 5, 1979, is reversed and Notice of Violation No. 79–II–53–2 and Cessation Order No. 79–II–53–3 are vacated.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE IRWIN DISSENTING:

I believe my colleagues' decision in this case is both unwarranted legally and unfortunate practically. In effect they hold that interference with inspections may only be remedied by recourse to Federal court under sec. 521(c) or 704 until the Secretary promulgates a regulation that specifically provides an administrative sanction for such conduct. I believe existing regulations authorize the issuance of a notice of violation for interference with inspections. 30 CFR 722.12(a) requires an inspector to issue a

notice of violation fixing a reasonable time for abatement if he finds a violation which is not covered by 30 CFR 722.11. Sec. 722.11 applies to conditions, practices, or violations of applicable performance standards, which create an imminent danger to the health or safety of the public or which are causing or can reasonably be expected to cause significant, imminent environmental harm. Although regular, thorough inspections are crucial to achieving compliance with the Act, the practice of interfering with an inspection would not necessarily create an imminent danger to public health or safety or cause significant, imminent environmental harm—although it might in some circumstances. Secs. 521(c) and 704, however, provide equitable relief and criminal sanctions for such interference, thus making plain that Congress considered such behavior a serious violation of the Act. Therefore, interference with inspections is "a violation which is not covered by § 722.11" for which "an authorized representative of the Secretary * * * shall issue a notice of violation." 30 CFR 722.12(a).

This interpretation of 30 CFR 722.12 is based on and parallels the enforcement provisions of the Act itself. Sec. 502(e)(1) requires the Secretary to implement an enforcement program for the purpose of ascertaining compliance with the standards of secs. 502(b) and (c). Compliance cannot be ascertained without regular, complete inspections. Allowing complete inspections, including the taking of photographs, is therefore a "requirement" of the Act, violation of which requires the issuance of a notice of violation under sec. 521(a)(3). 30 CFR 722.12(a) is thus the analogue to sec. 521(a)(3), just as 30 CFR 722.11 is to the sec. 521(a)(2) requirement for the issuance of a cessation order for conditions, practices, or violations that create imminent danger to the health or safety of the public or cause or may cause significant, imminent environmental harm.

By declining to interpret 30 CFR 722.12(a) as providing authority for the imposition of sanctions by the executive branch, my colleagues impose unwelcome burdens on Federal prosecutors and Federal courts and potentially encourage subversion of inspections—the essential activity for ensuring effective enforcement of the Act. At the least they impose an unnecessary rulemaking proceeding on the Secretary.

I dissent.

WILL A. IRWIN
Chief Administrative Judge

MAUERSBERG COAL CO.

2 IBSMA 63

Decided *May 16, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from a Nov. 30, 1979, decision of Administrative Law Judge Sheldon L. Shepherd

in Docket No. CH 0–51–R denying appellant's motion to dismiss an application for temporary relief and vacating Cessation Order No. 79–I–68–2, issued for failure to abate Notice of Violation No. 79–I–68–3.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Applications

Where an application for temporary relief includes none of the elements required by 43 CFR 4.1263, a motion to dismiss the application should be granted.

2. Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Evidence

Where an applicant for temporary relief fails to provide sufficient evidence to support the showings required by sec. 525(c) of the Act, it is error to grant such relief.

APPEARANCES: William F. Larkin, Esq., Office of the Field Solicitor, Charleston, West Virginia, Walton D. Morris, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; John L. Wagner, Esq., Clarion, Pennsylvania, for Mauersberg Coal Co.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This appeal was filed by the Office of Surface Mining Reclamation and Enforcement (OSM) from an Administrative Law Judge's decision denying OSM's motion to dismiss Mauersberg Coal Company's (Mauersberg) application for temporary relief and vacating Cessation Order No. 79–I–68–2, issued to Mauersberg for failure to complete the required remedial action set forth in interim step No. I of Notice of Violation No. 79–I–68–3. The Administrative Law Judge found that the modified abatement period contained in the notice was not reasonable and extended the abatement period for the purpose of providing time in which to establish a proper period for abatement. Subsequently, on Dec. 19, 1979, in response to OSM's motion for clarification, he indicated that the effect of his original decision was to vacate Cessation Order No. 79–I–68–2. We disagree with the Judge's conclusions and reverse for the reasons set forth below.

Factual and Procedural Background

On Oct. 25, 1979, OSM inspectors, pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act),[1] inspected Mauersberg's Minich mine, located in Clarion County, Pennsylvania, and permitted by the State under permit Nos. 344–39 and 39(A). As a result of this inspection Notice of Violation No. 79–I–68–3 was issued to Mauersberg for conducting surface coal mining operations outside

[1] 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

the permit area without approval from the State, as required by 30 CFR 710.11(a)(2).[2]

On Nov. 15, 1979, OSM conducted a followup inspection which resulted in the issuance of Cessation Order No. 79–I–68–2 for failure to abate the violation as required by interim step No. 1 of the notice. On Nov. 23, 1979, Mauersberg filed an application for temporary relief with the Hearings Division, pursuant to 43 CFR 4.1262.[3] A hearing was held on Nov. 29, 1979, at which time OSM filed a motion to dismiss the application for temporary relief. In his Nov. 30, 1979, decision the Administrative Law Judge denied OSM's motion to dismiss, found the abatement period granted by OSM to be unreasonable, and extended the abatement period until Dec. 7, 1979, for the purpose of providing time in which the parties could agree on a reasonable period of abatement. After the Judge's clarification order stating that the effect of his original decision was to vacate Cessation Order No. 79–I–68–2, OSM brought this appeal.

Discussion and Conclusions

In its appeal from the Administrative Law Judge's decision, OSM contends that he erred (1) in failing to dismiss the application for temporary relief because it failed to provide the specific information required by 43 CFR 4.1263, and (2) in granting temporary relief where the elements of sec. 525(c), 30 U.S.C. § 1275(c) (Supp. I 1977), of the Act and 43 CFR 4.1263 were not proved by the applicant. We agree.

[1] An application for temporary relief must show on its face that the applicant is entitled to that relief. 43 CFR 4.1263, which implements sec. 525(c) of the Act, requires that the contents of an application for temporary relief include:

(a) A detailed written statement setting forth the reasons why relief should be granted;

(b) A showing that there is a substantial likelihood that the findings and decision of the administrative law judge in the matters to which the application relates will be favorable to the applicant;

(c) A statement that the relief sought will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources;

(d) If the application relates to an order of cessation issued pursuant to section 521(a)(2) or section 521(a)(3) of the Act, a statement of whether the requirement of section 525(c) of the Act

[2] The remedial action contained in the NOV required that the affected area off the bonded permit area be regraded to approximate original contour, and that: (1) topsoil be redistributed; (2) drainage controls be provided; and (3) these areas be seeded or planted during the first period favorable for vegetation. The time for abatement was set for Feb. 14, 1980. The notice was modified the same day to establish two interim steps for the required remedial action. Interim step No. 1 encompassed the backfilling, regrading, and drainage control work, while interim step No. 2 encompassed the seeding and vegetative cover requirements. The notice was further modified on Oct. 26, 1979, to establish abatement periods for the interim steps: 10 a.m. on Nov. 15, 1979, for interim step No. 1; and 10 a.m. on Feb. 14, 1980, for interim step No. 2.

[3] The application failed to state the specific relief requested; however, the Administrative Law Judge, in his decision, indicated that statements by counsel for the applicant revealed that the relief requested was from imposition of an automatic fine for failure to abate a violation within the time set in the notice, as provided in 30 CFR 723.14.

for decision on the application within 5 days is waived; and

(e) A statement of the specific relief requested.

In the instant proceeding, Mauersberg's application contained none of the elements required by the regulation. Instead, the application stated in its entirety: "Mauersberg Coal Company respectfully requests a public hearing and temporary relief of Cessation Order No. 79–I–68–2." The inadequacy of the application was addressed in OSM's motion to dismiss, and the Judge should have granted the motion and dismissed the application.

[2] Assuming, *arguendo*, that the Administrative Law Judge need not have dismissed the application, it was nevertheless error to grant temporary relief after the hearing, because the applicant failed to prove the elements of sec. 525(c) of the Act.[4]

In the instant case Mauersberg failed to show that there was a substantial likelihood that the findings of the Secretary would be favorable to it. Rather, the evidence indicates that it had little or no likelihood of success on the merits. In fact, the Administrative Law Judge stated: "There can be little doubt from the evidence adduced at hearing that coal mining operations were being conducted off the permit area" (Decision, p. 3). He added: "Because it is quite clear that some mining was being done off the permit area, there is little likelihood that the applicant will prevail on the issue of the alleged violation" (Decision, p. 4). In addition, there was no showing or finding that the granting of temporary relief would have no adverse effect upon public health or safety or would cause no significant environmental harm. Thus, since Mauersberg failed to present any evidence to support the necessary findings, the decision of the Administrative Law Judge is unsupported by the evidence.

Therefore, it was error for the Administrative Law Judge to deny OSM's motion to dismiss and to vacate Cessation Order No. 79–I–68–2, and his decision of Nov. 30, 1979, is hereby reversed.[5]

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

[4] Sec. 525(c) provides that in order for temporary relief to be granted there must be a finding that:

"(1) a hearing has been held in the locality of the permit area on the request for temporary relief in which all parties were given an opportunity to be heard;

"(2) the applicant shows that there is substantial likelihood that the findings of the Secretary will be favorable to him; and

"(3) such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources."

[5] In reversing the decision the Board denies Mauersberg's request for joinder of parties involved in an alleged bankruptcy proceeding. The Board further declines to stay the commencement or continuation of the present action because of that alleged bankruptcy. *See* 11 U.S.C.A. § 362(b)(4) (West Supp. 1979).

APPEAL OF LAMAR D. CONSTRUCTION CO.

IBCA-1224-11-78

Decided *May 20, 1980*

Contract No. H50C14200288, Bureau of Indian Affairs.

Sustained in Part.

1. Contracts: Construction and Operation: Allowable Costs

Where performance by a construction contractor was timely completed and no issue of liquidated damages is presented, an unforseeable, area-wide cement shortage causing increased cost to the contractor will not entitle the contractor to a compensatory adjustment.

2. Contracts: Disputes and Remedies: Jurisdiction

The Board has no jurisdiction to reform a contract which is not governed by the provisions of the Contract Disputes Act of 1978. Therefore, where the contract is not under that Act, and a construction contractor presents some evidence in support of a claim that the method of testing, employed by the Government to determine the compressive strength of structural concrete, is unfair, resulting in wrongful monetary penalties, but fails to allege or prove that the Government did not comply with the contract specifications in performing such testing, the Board will find such claim to be a request for reformation of the contract and will dismiss the claim for lack of jurisdiction.

3. Contracts: Construction and Operation: Changes and Extras

The Board finds that constructive changes occurred: (1) when the Contracting Officer's Representative directed the contractor to pour concrete into forms, slightly out of compliance, but approved by him with knowledge that some overruns might result; and (2) when the contract documents did not specify the requirement for construction of diversion works at certain sites, neither of the contracting parties being aware of the need for such construction until flooding by upstream activities of third parties, and the Contracting Officer's Representative ordered the diversion works constructed which was necessary to complete the project, advised the contractor that it would be paid for the extra costs incurred, and notified the Contracting Officer by letter which enclosed a copy of the project plans with the diversion channels for the extra construction drawn in.

APPEARANCES: Hugh C. Garner and Roger P. Christensen, Esqs., on behalf of LaMar D. Construction Co.; Fritz Goreham, Esq., Department Counsel, Phoenix, Arizona, on behalf of the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

This appeal stems from a contract, dated June 20, 1977, between the United States Department of the Interior, Bureau of Indian Affairs (BIA), and LaMar D. Construction Co., of Altamont, Utah (appellant) for the construction of six box culverts and the installation of three arch plate pipe culverts on the Uintah and Ouray Indian reservation, Duchesne and Uintah Counties, Utah. The contract price was for $202,810.21. The construction performance was considered

timely and substantially complete on Oct. 27, 1977. It was accepted as final on Nov. 12, 1977, without the incurrence of liquidated damages.

However, certain disputes developed between the parties involving claims by appellant of changed conditions, overruns of concrete, unforseeable cement shortages, and erroneous testing of concrete compressive strength. All of such claims were denied by the Contracting Officer (CO) in his findings of fact and decision dated Sept. 27, 1978. The appellant appealed from that decision by filing a timely notice of appeal on Oct. 27, 1978, with the Contracting Officer who transmitted the same to this Board on Nov. 16, 1978.

The appellant, by its complaint set forth four claims for relief totalling $25,070.25, and a fifth claim requesting interest on the total amount found due as provided by law. The four specific claims may be summarized as follows: (1) That between the times of its initial bid and when ready to make the first concrete pour—May and Aug. of 1977—an unforeseeable statewide and regional shortage of cement products was encountered; that as a result, appellant was required to locate and purchase "bag cement" in piecemeal fashion instead of by bulk quantities as planned; that the result was an increased cost of $13 per cubic yard for 445 cubic yards of concrete specified in the project plans, totalling $5,785. (2) That appellant established a quality control plan to assure that the structural concrete required by the specifications would meet the specified minimum compressive strength of the concrete at 3,000 lbs. per square inch in 28 days; that the mix formula was approved by the Contracting Officer's Representative (COR), and calculated to meet the required compressive strength; that the formula used by BIA as set forth in sec. 558–1 (FP–74) at page 205, is unfair in that it permits the BIA to arbitrarily pick the lowest test results in arriving at the average compression strength of a given lot; that at sites 2, 5 and 9, BIA erroneously discounted the pay factors resulting in a loss to appellant of $4,325.95, based upon the accepted quantity of 102.57 cubic yards of concrete poured at those sites. (3) That there was an overrun of item 558 (2), structural concrete, of 55 cubic yards because of reliance upon directions of the COR and project inspector to make the concrete pours regardless of overruns and that overruns amounting to less than 25 percent would be compensable. However, in this claim, appellant refers to Exhibit I, attached to the complaint and concedes that that exhibit, a memo dated Dec. 27, 1977, written by the COR, shows that 14.5 cubic yards were wasted, but alleges that the COR ordered an additional 2 cubic yards at site No. 9 to assure sufficient quantity but that these 2 cubic yards were never used and eventually dumped at a loss to the appellant. Nevertheless, appellant claims a total of 55

cubic years at $179.26 per cubic yard for a total of $9,859.30. (4) That extra work was required to be performed by appellant for the construction of diversion works during the course of construction but which was not shown on the working plans. Appellant alleges that an irrigation company, not having been informed by the Government of the construction project opened its gates upstream and inundated the construction sites, and that site 8, previously dry for more than 13 years, was flooded by a new mining works upstream from the site. Appellant further alleges that it was directed by the COR to construct all diversion works necessary to protect the sites and was told by him that BIA would pay for the work as an apparent "differing site condition." Appellant claims $5,100 for these additional costs.

By way of answer to appellant's complaint, the Government entered a general denial and incorporated therein by reference the decision of the CO as stating the Government's position on each point raised by appellant in its complaint.

Neither party requested a hearing in this matter and neither party submitted supplements to the record nor briefs pursuant to the order settling the record issued by the Board. Appellant did, however, attach to its complaint Exhibits A–R and did submit a supplemental brief along with its complaint. This appeal, therefore, was submitted to the Board on the record which consists of the appeal file and the aforesaid exhibits attached to appellant's complaint.

Discussion of the Evidence

One of the principal items of evidence relied upon by appellant is the unrefuted affidavit of Mr. Bert D. Ames, dated Jan. 20, 1979 (Appellant's Exh. E). He stated therein that he is a licensed general contractor in the State of Utah, but for the 4-year period prior to the subject project had worked for appellant in various capacities. For this project, he served as superintendent. He stated, with respect to claim No. 1, that he personally supervised the construction work at all of the nine project sites and "worked on a near—daily basis with Tony Zufelt, Project COR, and Vernon Russell, Project Inspector"; that because of the shortage of ready mix cement products in the State of Utah, he was required to purchase "bagged cement," haul it to the work sites and manually mix it with the sand, gravel, and water mixture delivered in ready mix trucks; that, with respect to claim No. 2, appellant had worked in the field of highway and bridge construction for approximately 12 years and has had considerable experience in cement mixing and structural concrete; that from this experience and by personal supervision of the mixing and pouring of the structural concrete, he had no doubt that a minimum test strength of 3,500 to 5,000 lbs. per square inch resulted by virtue of the concrete mix formula used

by appellant at the nine project site; that, with respect to claim No. 3, the concrete forms were approved by either the Project COR or the Inspector; that during or around the time of the second concrete pour it becomes evident that greater amounts of structural concrete would be required than estimated in the invitation for bids or by the project specifications and calculated an overrun of about 61 cubic yards; that the COR was advised of the expected overruns, and after apparently contacting the CO the COR assured affiant that overruns were expected in projects of this kind and that overruns amounting to less than 25 percent were reimbursable by the BIA; that in reliance upon those representations, affiant continued to make concrete pours in conformance with the forms as approved by the project COR and/or the Inspector; that while some concrete was lost by nonuse, 2 cubic yards were lost because of instructions from the COR to make available 2 additional cubic yards to assure a complete pour at the remote site No. 9 prior to the weather turning colder, but the 2 cubic yards were not needed and eventually dumped; that, with respect to claim No. 4, after review of the project plans he concurred with Mr. Stevenson (LaMar D. Stevenson, owner of the appellant company), prior to construction, that diversion channels were not required by the plans at site Nos. 4, 5, 6, 7, and 8 and that the canals and washes at those sites would not contain water during the construction period; that those sites were flooded out during the course of construction because of the diversion of large amounts of water into the canal by Dry Gulch Irrigation Co. and at site No. 8 by water from a newly started mining operation upstream; that it was later learned that these parties had not been informed by BIA of the construction being performed by appellant; that the COR was surprised at the water in the canal so late in the season, was unaware of the mining operation, and wrote a letter to the CO expressing a need for extra diversion works and recommended that appellant be paid for the additional work; that attached to that letter was a copy of the project plans with "drawn in" diversion channels.

The remaining exhibits attached to appellant's complaint generally support the allegations of the cement shortages, that extra work was required for diversion works; that overruns occurred with regard to quantities of concrete poured, and that independent engineers agree with appellant that BIA's method of computing compressive strength of poured concrete was unfair (Appellant's Exhs. A–D and F–R).

The Government offered no evidence to support the record by way of documentary exhibits or testimony by affidavit. It relied solely on the appeal file and the position

stated by the Contracting Officer in his findings of fact and decision.

Findings of Fact and Conclusions

Based upon the evidence discussed above and the entire record presented, the Board finds, concludes, and decides with respect to each of the claims presented as follows:

Claim No. 1—Extra Costs Incurred as a Result of Unforeseen Shortages of Cement

[1] We find that there was indeed an unforeseeable cement shortage which may have resulted in extra costs to appellant. We conclude, however, that, as a matter of law, no compensatory allowance for this claim is available to appellant. We believe that appellant has clearly proved excusable cause for delay, had there been a delay in the performance of the contract because of the unforeseen cement shortages, but performance was timely completed and no issue of liquidated damages presented. No legal authority was cited by appellant showing entitlement to a compensatory adjustment in this circumstance and we know of none. Therefore, claim No. 1 is denied.[1]

Claim No. 2—Unfair Testing Method Used by BIA to Determine Compression Strength of Concrete

[2] The contracting officer expressed in his decision the view that appellant did not understand the quality control specifications pertaining to the testing of concrete for compressive strength and misapplied the formula to questioned samples. Nevertheless, the only evidence offered by appellant for this claim was the opinion of Mr. Ames in his affidavit (Appellant's Exh. E) that he was especially careful to mix the concrete to assure that the pounds per square inch of compression would meet specified requirements and the hearsay views of independent engineers as stated in a letter from appellant to the (CO) (Appellant's Exh. N) that there is one common method of obtaining the average test break: "Disregard any outstanding low cyl breaks and average the rest." Appellant neither alleged nor proved that BIA did not follow the specifications in making the pay factor calculations resulting in penalties assessed against four different concrete pours. Likewise appellant neither alleged nor proved that it was singled out from other contractors and treated any differently by BIA in calculating pay factors for the concrete pours. In fact, the crux of this claim is simply that the method employed by BIA was unfair. The Board views this claim as a request to reform the contract. Since this contract does not come within the provisions of the Contract Disputes Act of 1978, our jurisdiction does

[1] *See Irwin & Leighton* v. *U.S.*, 101 Ct. Cl. 455 (1944); *Appeal of Marden Corp.*, ASBCA 8934 (1963), 1963 BCA par. 3938.

not include reformation authority.[2] Therefore, claim No. 2 is dismissed.

Claim No. 3—Overrun of Structural Concerete

[3] We find from the evidence that, because the COR directed the appellant to make the concrete pours into forms previously approved by him, an overrun of 55 cubic yards resulted. This constituted a constructive change entitling appellant to an equitable adjustment.[3] However, by its complaint appellant admits that Exhibit I shows that 14½ cubic yards were wasted and has proved to our satisfaction that 2 cubic yards were wasted as a direct result of an order by the COR. Therefore we find that the equitable adjustment should be based upon the 55 cubic yards of overrun minus the net 12½ cubic yards wasted or a total of 42½ cubic yards of overrun. We further find that because of the constructive change, appellant is entitled to be paid its actual cost of the overrun, which, because of the cement shortage, was not the unit bid price of $179.26 per cubic yard, but rather $192.26. This allows for the $13 per cubic yard of increased price for the bagged cement. Therefore, we hold that appellant is entitled to an equitable adjustment for 42½ cubic yards of overrun at $192.26 per cubic yard or a total of $8,341.05 for claim No. 3.

Claim No. 4—Cost of Construction of Extra Diversion Works

We find, based upon the unrefuted affidavit of Mr. Ames (Appellant's Exh. N), the (CO) findings of fact and decision, and appellant's Exhs. M, N, P, and R as follows: (1) that the contract plans did not specify construction of diversion works at sites 4, 5, 6, 7, and 8; (2) that such construction was obviously necessary to complete the project and was directed to be done by the COR after the flooding activities of the irrigation company and mining operation upstream were discovered; (3) that notice to the contracting officer of the claim for this additional work was duly given and that such claim was denied by him.

The CO relied upon the application of the technical, general provisions of the specifications for his denial of this claim, asserting that the claim was for work included in the contract plans. The specific language, which he quoted in his denial (Appellant's Exh. R) is taken from FP–74 section 206.01 and the special provisions of the technical specifications, and reads as follows.

> This work shall include necessary bailing, pumping, draining, sheeting,

[2] P.L. 95–563, 92 Stat. 2383, 41 U.S.C. A. §§ 601–613 (West Supp. 1980). Although sec. 8(d) of that Act authorizes agency boards of contract appeals "to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims" the Act does not apply to claims upon which the final decision of the (CO) was issued prior to Mar. 1, 1979. *See Appeal of L. M. Johnson, Inc.*, IBCA–1268–5–79 (Sept. 28, 1979), 86 I.D. 508, 79–2 BCA par. 14,070.

[3] *See Appeal of Environmental Consultants, Inc.*, IBCA–1192–5–78 (June 29, 1979), 86 I.D. 349, 79–2 BCA par. 13,937.

bracing, and the necessary construction of cribs and coffer dams and placing of all necessary backfill.

* * * * *

This work also includes the construction, maintenance, and removal of canal and stream diversions and road detours as stated in subsection 104.04, maintenance for traffic at the site shown on the plans.

We are not convinced that the CO was justified in relying upon the aforequoted language to hold the contractor responsible for the construction of the diversion works as being included in the original project. The record here indicates, and we find, that neither of the contracting parties was aware of any need for construction of the subject diversion works until the flooding by the upstream activities actually occurred, which was after the contract had been awarded and the project work partially performed. We further find that the diversion works construction at the subject sites was, in fact, extra work beyond the scope of the contract plans and specifications as contemplated by the parties.

We conclude that a constructive change occurred when the COR ordered that the work be done, advised the appellant that it would by paid for the cost thereof, and notified the CO by sending him a letter enclosing a copy of the project plans with the diversion channels for the extra construction "drawn in." [4]

[4] *Id.*

The proof of quantum, presented by appellant, itemized the costs for this claim in the total amount of $5,100 and was not challenged by the Government. Therefore, we hold that appellant has made out an unrebutted prima facie case for entitlement to an equitable adjustment, on the ground of constructive change, for the full amount of claim No. 4.

Decision

Accordingly, it is the decision of this Board: That appellant's claim No. 1 is denied; that claim No. 2 is dismissed; that claim No. 3 is sustained in part, in the amount of $8,341.05; that claim No. 4 is sustained in the full amount of $5,100; and that appellant, in addition, is entitled to interest on $13,441.05 pursuant to the interest clause of the contract and as provided by law.

DAVID DOANE
Administrative Judge

We concur:

WILLIAM F. MCGRAW
Chief Administrative Judge

G. HERBERT PACKWOOD
Administrative Judge

ADDINGTON BROTHERS MINING, INC.

2 IBSMA 90

Decided *May 22, 1980*

Petition for discretionary review by Addington Brothers Mining, Inc., of a

Dec. 14, 1979, decision by Administrative Law Judge Joseph E. McGuire in Docket No. NX 9-29-P, holding that Notice of Violation No. 79-II-15-2 was properly issued, but reducing the resulting civil penalty.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally—Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure

Under 43 CFR 4.1153 OSM has an absolute right to submit an answer to a petition within 30 days from receipt of a copy of the petition. After that time, the Administrative Law Judge has discretion to regulate the scope of the answer in any reasonable manner.

APPEARANCES: Roy F. Layman, Esq., Ashland, Kentucky, for Addington Brothers Mining, Inc.; John P. Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Mark Squillace, Esq., and Donald C. Baur, Esq., Office of the Solicitor, Washington, D.C., all for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act),[1] on Feb. 13, 1979, inspectors from the Office of Surface Mining Reclamation and Enforcement (OSM) inspected Addington Brothers Mining, Inc.'s (Addington's), Paint Creek No. 4 surface mine in Morgan County, Kentucky. OSM issued Notice of Violation No. 79-II-15-2 to Addington for alallegedley allowing spoil and debris to remain on the downslope in violation of 30 CFR 716.2.[2]

OSM notified Addington that it was proposing a civil penalty of $1,700 for the violation. Addington requested an assessment conference with OSM which was held on May 21, 1979. As a result of that conference, the proposed assessment was raised to $2,400.

Addington filed a timely petition for review of the proposed assessment with the Hearings Division. OSM's answer was filed on the 35th day after it received the petition. At the hearing, held on July 27, 1979, Addington moved to strike OSM's answer and to be granted a default judgment. Addington based its motion on the argument that 43 CFR 4.1153 required OSM to file its answer within 30 days of the filing of the petition. The Administrative Law Judge denied the motion but accepted the suggestion of OSM's counsel that the issue be discussed

[1] 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[2] This is the special initial performance standard applicable to surface coal mining operations on steep slopes. Addington did not appeal the Administrative Law Judge's determination that sustained the violation of this regulation.

in posthearing briefs.[3] In a commendably thorough opinion issued on Dec. 14, 1979, the Administrative Law Judge held that 43 CFR 4.1153 was a procedural directive over which he had discretion [4] and upheld the issuance of the notice of violation, but reduced the civil penalty to $2,100.

Addington timely appealed this decision and briefs from both parties have been received.

Discussion and Conclusion

Addington bases its appeal on OSM's late filing of its answer. There is no dispute that the filing was late under 43 CFR 4.1153. The issue concerns the consequences of such a late filing. Addington contends that the answer should be stricken and a default judgment granted against OSM. OSM argues that Addington was not prejudiced by the late filing and that a default judgment is inappropriate.

[1] 43 CFR 4.1153 provides that "OSM *shall have* 30 days from receipt of a copy of the petition within which to file an answer to the petition with the Hearings Division, OHA." (Italics added.) Within that time OSM is entitled to file a brief. After that time has run, OSM no longer possesses such an absolute right. The Administrative Law Judge then has discretion to regulate the scope of the answer in any reasonable manner.[5] In the event the Administrative Law Judge finds that the petitioner has been disadvantaged, he may issue whatever order is required to correct the situation. Certainly he may receive an answer, without sanctions, at any time prior to a suitable motion by the petitioner. This is what the Administrative Law Judge did in this case, and we see no reason to fault him.

The Dec. 14, 1979, decision on the Administrative Law Judge is affirmed.

WILL A. IRWIN
Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

[3] Tr. at 5–6, 64–65.

[4] Decision of Dec. 14, 1979, in Docket No. NX 9–20–P, at p. 11:

"The rule at issue, 43 CFR 4.1153, is unquestionably one of a procedural nature and thus the general rule to the [*sic*] applied is that of finding that it is always within the discretion of a court of [*sic*] an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of *substantial prejudice* to the complaining party, *Health Systems Agency of Oklahoma, Inc.* v. *Norman*, 589 F. 2d 486 (10th Cir. 1978); *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 25 L. Ed. 2d 547 (90 S. Ct. 1288); *N.L.R.B.* v. *Monsanto Chemical Company*, * * * [205 F. 2d 763 (8th Cir. 1953)]."

[5] *See, e.g., Warr* v. *Norton*, 190 Okla. 114, 121 P. 2d 583, 584 (1942).

U.S. GOVERNMENT PRINTING OFFICE : 1980 O - 323-081